REGULATION OF FOREIGN COMMERCE BY THE INTERSTATE COMMERCE COMMISSION

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It is the purpose of this paper to discuss the relation of the Interstate Commerce Commission to through export and import traffic. To this end, the subject matter is grouped under four headings: the integration of ocean and inland commerce; the present authority of the Interstate Commerce Commission; the consequences of incomplete jurisdiction; and suggested legislation.

The organization of through transportation systems has changed the entire aspect of commerce within the last three decades; consequently an exposition of the integration of ocean and inland commerce may well precede the discussion of needed legislation.

I

Integration of Ocean and Inland Commerce

The most striking feature of the present organization of commerce is the through character of business and interrelation of the trunk line railroads of the United States with the various trans-oceanic carriers. The world's commerce is no longer carried on by a large number of dissociated, warring companies. Competition has given way to cooperation and merger. The old system of frequent transhipment has been replaced by through routes, through rates and through arrangements which make possible the remarkable celerity of present business transactions. The trunk line railroads and the trans-oceanic steamship companies have so splendidly organized their joint services that the shipper may now send his merchandise from an inland city of one country to a remote point in a foreign land, and have no concern as to its safety; for the contract covering the entire journey is or may be closed the moment it is given over to the initial carrier.

To-day, a miller in Minneapolis exporting flour, can secure his through bill of lading from the place of manufacture to ultimate

destination in Europe, insure the flour under a through certificate of insurance against all risks of transportation, railroad or marine, from mill to the foreign consignee, sell his bill of exchange drawn in the currency of the country to which the flour is destined, and literally do all the business connected with the transaction upon his own doorstep within the short space of time elapsing between the milling and the final shipment of the flour. On the day the flour is shipped from the mill the manufacturer is substantially free from any further responsibility or liability. This system applies not only to export flour but to the export trade in general. As a practical illustration of this, a miller in Minneapolis may buy his wheat on Monday, grind it into flour on Tuesday, sell the flour abroad on Wednesday, very readily ship it on Thursday, and one hour after the flour is loaded into railroad cars at the mill he can obtain his through export bill of lading from the mill door in the United States to the warehouse of the buyers at foreign ports of destination.

Through Conditions.—Simultaneously with the issuing of the through bill of lading, a certificate of insurance is issued by underwriters, which explicitly undertakes to cover the flour throughout the whole course of transportation. The title to the property, as well as to all the rights and responsibilities of the underwriters conveyed by the certificates of insurance, passes from one bank to another by simple successive endorsements on the bill of exchange, and this only because a through bill of lading has been issued therefor, which is the recognized inviolable title to the merchandise. The western banker readily purchases of the miller his exchange on the foreign buyer, for such documents are the most acceptable form in which a remittance can be made to foreign correspondents, but the banker would not purchase this kind of exchange at all unless a through bill of lading was attached thereto. These shipping documents the banker then sends to his correspondent in, say, Copenhagen, where they are retained by the local Danish banker to be surrendered when the flour is ultimately delivered to the consignee. In the meantime, from the day the flour was originally shipped until it is finally delivered to the consignee, the various manipulations of the property are conducted by the respective land and water transportation companies, without the intervention and indeed, substantially without the knowledge of the shipper or receiver of the cargo,

the transporters having assumed by the through agreement to relieve the seller, bankers and buyer of all these intermediate factors and conditions.

Eastbound Shipments. Western exporters constantly make through export contracts for the shipment of products on through bills of lading, with the agents of the various railroads located through the West and South. The steamship companies themselves often do not know the names of the shippers or the precise locality from which the merchandise is forwarded, until the tissue copies (duplicates) of the through bills of lading as signed by the railroad company's officers are transmitted to the steamship company's office. Such a bill of lading contains a large number of stipulations many of which are intended to frighten the unsophisticated. Those made by the inland carrier are first set forth. Then follow the conditions submitted by the ocean carrier. The merchandise to be transported is described and note made of the various marks. The inland rate and the ocean rate are shown separately. Where the agent of the railroad receives payment for the through transportation he stamps on the bill "Freight Prepaid to Destination." This is a *through* contract over a *through* route at a *through* rate.

Through Freight Prepaid. It constantly happens that the inland and ocean freight are both prepaid. This presupposes that the miller or provision packer has sold his goods at a price delivered at final destination abroad. The draft drawn and the amount of insurance is correspondingly increased as much as the inland freight and ocean freight together.

Westbound Shipments. A similar statement might be made with respect to westbound traffic originating in Europe and destined to the interior of the United States. Frequently merchandise shipped as above, on through bills of lading, from, say, Hamburg to an inland place of destination in the United States, say Chicago, has the entire ocean and inland freight prepaid. A foreign seller, like an American exporter, makes a price delivered at final destination, including the payment of entire through freight. In other cases, where merchandise is shipped from abroad at a through rate of freight on a through bill of lading, the connecting trunk line railroad collects from the party to whom it is ultimately delivered in the interior of the United States the entire through charge for transportation, and reimburses the steamship company for the ocean car-

riage. Through westbound merchandise forwarded in bond from the seaboard, is retained in the custody of the United State Government until its eventual arrival at interior port of destination. It is then surrendered to the owner of the property only upon his delivering to the collector of customs the original through bill of lading issued by the steamship company at the port of origin. Were it not for the through bill of lading, goods would be retained at the seacoast port of entry until customs duties were paid, thus involving great delay and expense.

Insurance. Contracts of insurance are daily made covering the value of the goods and assuring the owner their safe transportation (inland and marine), and their ultimate delivery. This system of through insurance is probably the most comprehensive system of insurance extant to-day, covering, as it does, all character of risks and damages on merchandise over the inland carriers, land and water, during transit, in the warehouse, or on shipboard or intermediary lighters,—the system providing for the ultimate subrogation of the interests of the owners of the property against any of the respective carriers. This is another instance where all the parties concerned in a through shipment endeavor to tie the transaction together in its entirety, so that there shall be no intermediate steps where the one insurance or responsibility has ceased before the other attaches.

Through Bill of Lading. Prior to 1880, all merchandise intended for export was forwarded by the railroads on domestic bills of lading to the seaboard and from there reforwarded on an ocean bill of lading. Often thirty or forty days elapsed before the railroad had delivered the merchandise for transhipment. An additional sixty and sometimes ninety days was consumed before the shipper was again in possession of his capital. The export bill of lading now in use was prepared by the Transatlantic Freight Conference in 1899, and approved and adopted by the Trunk Line Association and affiliated railroads April 1, 1901. It is the outcome of many years of negotiations between the trunk line railroads and the ocean carriers to formulate and promulgate an instrument which would be of acceptable and conclusive character to financiers and underwriters, the necessary intermediaries in connection with all the export or import traffic of the United States. The object was to issue a negotiable instrument which would fairly and

plainly designate the responsibilities assumed and the exceptions provided for. Originally through bills of lading were issued at only a few of the large designated commercial centers; now they are obtainable from hundreds of railroad officials throughout the United States and in all important European centers. The railroad companies now prepare and issue these through bills of lading on which eastbound or export traffic moves, for themselves and for the steamship companies. On the other hand the steamship companies issue for themselves and the trunk line railroads through bills of lading on which westbound or import traffic moves to the interior centers of the United States.

Immigrants. Immigrants upon reaching the European port of departure book to their final destination in the interior of the United States, and are manifested through via American trunk line railroads. The through passenger ticket is similar to the through bill of lading. In one case the through freight is provided for, and in the other the through fare, and in each case there is an arrangement between the ocean and inland carrier for through transportation. There is a large and constantly increasing traffic in through emigrants from interior points in the United States to European countries. No fewer than three transatlantic steamship conferences, with headquarters in New York, with their thousands of exclusive agents are engaged in conducting the immigrant and emigrant business under through systems of tickets, and of orders upon steamship companies and railroads.

Through Rates. As already noted, it frequently happens that the steamship company is without knowledge as to who engages certain freight, where it originates, or as to any other circumstance relating to it prior to the time of arrival alongside the steamer. In such instances the railroad company is serving as the agent of the steamship company. The Transcontinental Railway Freight Bureau has on file with the Interstate Commerce Commission (I. C. C. 847) a schedule of what are called inward-bound European through rates. These through rates apply via those steamship lines operating from ports of clearance in conjunction with no fewer than fourteen American railroads (among others the Illinois Central, Sante Fé System, and the Union Pacific), from thirty-six European ports (among others, Hamburg, Copenhagen, Liverpool) to such points as San Francisco, Los Angeles, and Portland. It is specially

stipulated that through rates will be protected only when the merchandise is routed by the general European agents of the American railways or authorized under the system of through bills of lading and through rates now in general use.

The import committee of the Congress of American Railways have arranged inland commodity rates on certain merchandise which apply only to through import traffic. The various steamship companies acting in concert issue on these same commodities special ocean rates of freight which they will quote or permit to be quoted only on shipments moving directly to the interior of the United States. The inland and ocean carriers have thus made special provision for through foreign traffic both as to ocean and inland movement. In arriving at the rates referred to, the American railways take into consideration the cost of the merchandise when landed at the American seaboard as compared with the appropriate selling price at ultimate destination. Thus the import inland rate on certain designated commodities bears a definite relation to the charge for the ocean transportation. It is a proportion of a through rate. Perhaps no better illustration of the complete integration of inland and ocean commerce can be offered than by referring to the Hamburg-American Company's freight service between the North Atlantic ports of the United States and the countries about the Baltic. Minneapolis and Duluth furnish great quantities of the flour, and Omaha and Kansas City great quantities of the provisions which enter into this trade. The merchandise from these various sources is moved first to Chicago, and from there is carried eastward by the trunk line railroads and lake vessels to be again distributed through various channels to the six important United States North Atlantic ports. Immediately after arrival at these ports the merchandise is transhipped on board a vessel of one of the lines serving the Baltic. On arriving at Hamburg, Bremen, Hull, or Copenhagen, depending on whether the Hamburg-American Packet Company, the North German Lloyd, the Wilson (Hull) Line, or the Scandinavian-American Line has been the ocean vehicle of transportation, a further transhipment takes place on board lighters and coasters belonging usually to the same companies as the transoceanic lines and by these latter vessels delivery at final destination is made to consignees in 150 or more Norwegian, Swedish and Finnish ports. Only the vehicle of transportation is changed. This change in vehicle very

likely occurs many times within the United States; it may also take place after the American seaboard is passed. In any event there is a through route, a through rate, and a through bill of lading. The transportation is a through transportation. It is an inseparable entirety.

From the foregoing, it is clear that the trunk line railroads and their connections, in conjunction with the ocean steamship companies, have assumed a through contract to deliver the merchandise (dangers and accidents of the sea excepted) to the ultimate port of destination, and that until so delivered the property is covered by inland or marine insurance, or by liability of the common carrier against substantially all risks of land and water. Thus the shipper is made absolutely secure. Given perfect freedom of ocean transportation in addition to through conditions and perfection in transportation is reached.

Unfortunately, such conditions do not exist. But is not the sea a highway free to all? Both the Supreme Court of the United States and the Interstate Commerce Commission[1] have answered this query in the affirmative. Said Mr. Justice Bradley in Railroad Company *vs.* Maryland, 21 Wall. 456:

> Page 470, "Maritime transportation requires no artificial roadway. Nature has prepared to hand that portion of the instrumentality employed. The navigable waters of the earth are recognized public highways of trade and intercourse. No franchise is needed to enable the navigator to use them."

This opinion was handed down in 1874, before any of the modern conditions which affect through trade began to make themselves felt. The Atlantic cable had barely been put into successful operation, and the through bill of lading was substantially unknown. The words of the learned judge are, however, as true to-day as when he first gave them utterance. No franchise is needed to sail the seas, nor. will such a franchise ever be required. In the face of this assertion, it may seem paradoxical, but it is nevertheless undeniable, that on no portion of the earth's surface are the means of transportation so completely controlled and monopolized as they are on the high seas.

No better example can be cited than the conditions under which

[1]Cosmopolitan Shipping Co. *vs.* Hamburg-American Packet Co., 13 I. C. C. Rep. 266.

is conducted the commerce of the United States with northern Europe. This great commerce is carried on under agreements among certain steamship aggregations. The English, French, and American transatlantic steamship interests, fearing destructive competition on the part of the German interests, agreed, in 1902, not to transport for a period of twenty years either passengers or merchandise by direct steamers to or from northern European continental ports. This agreement leaves the control of the entire trade of northern continental Europe in the hands of the Hamburg-American Packet Company and its associates, which together constitute the Baltic pool.[2] Not only have certain steamship interests divided the field, but they have in addition apportioned traffic. This applies particularly to the Baltic trade of the United States.

The sea itself is still a highway free to all, but when one carrier controls 100 per cent of the westbound and 97 per cent of the eastbound traffic of the six great North Atlantic ports of the United States with the most important port of continental Europe (Hamburg), as was the case in 1906, there is a monopoly in transportation.[3]

The export and import trade of the United States with Germany in 1906 was $389,000,000. During 1907 this trade increased to $418,000,000. The figures for the calendar year 1907 ($435,000,000) indicate that the total for the fiscal year 1908 will not be far from $450,000,000. This immense trade is carried on almost exclusively by two steamship companies, the Hamburg-American Packet Company and the North German Lloyd.

Effect of Competition of Charter Tonnage

But will not the actual or potential competition of charter tonnage minimize the evils which might arise from steamship pools and monopolies? It must be evident from the through nature of traffic that charter tonnage and similar competition is not only

[2]The Cunard Line has kept itself freer from pool agreements than have the other lines.

[3]Number sailings eastbound in 1906 from Boston, New York, Philadelphia, Baltimore, Norfolk and Newport News to Hamburg:

Hamburg-American Packet Company; Union Line, owned and operated by Hamburg-American Packet Company	198
Other sailings	9
	207

a negligible factor but that it is non-existent in so far as merchandise is carried on through bills of lading.[4] In the transoceanic trade, charter tonnage does not and cannot offer an effective successful competition to line steamers, for it is without the following essential elements in through transportation:

1. To become a successful competitor requires—
   (*a*) Regular sailings from a fixed berth.
   (*b*) Facilities for granting through bills of lading, east and west bound, as well as local bills of lading.
   (*c*) Terminals, at which traffic as it currently arrives can be received and cared for preparatory to transhipment aboard ocean carriers.
2. Such organized responsibilities in connection with the issuing of bills of lading (local and through) as would be satisfactory to shippers, bankers, underwriters, buyers, and others concerned.
3. Chartered steamers would not be willing to fit themselves with dunnage and other requirements necessitated by the miscellaneous character of the general cargo to be carried, nor would marine underwriters, unless at exorbitant premiums of insurance, cover perishable or delicate cargo by such conveyance.
4. In the transoceanic trade, chartered tonnage rarely supplements the capacity of line steamers, except for the single article of grain, and then only when grain freight rates are much above an average figure.
5. Under ordinary conditions merchandise is now transported from Chicago to the seaboard in fifteen to thirty days. It is therefore idle to assume that either charter tonnage or "fill up" rates can in any way affect the transportation of commodities other than in the case of those originating at the seaboard.

As industries, such as steel and iron have been integrated, so also have the transportation systems of the world become welded into a compact organization. This amalgamation has brought with it great evils, but it has also been a great boon to the commercial world. Twenty-one years ago the American people determined to rectify the wrongs which carriers were in the habit of visiting on shippers. To this end, they passed an act to regulate commerce.

[4]Each succeeding year charter tonnage becomes less and less a factor in world transportation. See Railroad Gazette, Vol. 44, May 8, 1908, The Ocean Carrier, J. Russell Smith.

When that act was passed, the process of amalgamation had scarcely begun. The logical outcome of integration was totally unforeseen. No one dreamed that ocean commerce would be so organized as to form an essential and inseparable part of inland commerce. No one imagined it possible to construct the monster Mauretania. No one would have prophesied that a single company would in less than a quarter of a century possess more tonnage than the over-sea steam tonnage of America. No one would have risked his reputation by asserting that within twenty years a foreign steamship company would reach into the storehouses and mills and factories of our middle West. Yet such are the conditions at present.

II

Present Authority of the Interstate Commerce Commission

The Interstate Commerce Commission was created by an act of Congress, February 4, 1887.[5] In the Hepburn Bill, June 29, 1906, entitled "An Act to Regulate Commerce,"[6] many of the defects in the former act were remedied. The commission has risen from the capacity of an advisory board to the dignity of a court with inquisitorial powers. It is the purpose of this portion of the paper to discover the intent and control which the commission may exercise under this act over through traffic as described in the foregoing pages.

The first section of the law defines the jurisdiction of the commission. Eliminating unimportant words, it is as follows:

> That the provisions of this act shall apply to any corporation or any person or persons engaged in the transportation of oil or other commodity . . . and to any common carriers engaged in the transportation of passengers or property wholly by railroad (or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment) . . . from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to the transportation in like manner of property, shipped from any place in the United States to a foreign country and carried from such place to a port of transhipment, or shipped from a foreign country to any place in the

[5] 24 S. L. 379.
[6] 59 Congress, Sess. I, Ch. 3591.

United States and carried to such place from port of entry either in the United States or an adjacent foreign country: *Provided, however,* That the provisions of this act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property wholly within one state and not shipped to or from a foreign country or to any state or territory as aforesaid.

The carriers affected by the act are primarily railroads. Under certain circumstances water carriers may also come within the act, but this occurs only when there is some common control, management, or arrangement existing between a rail and a water carrier. Thus a steamship company transporting coal from Philadelphia to New York is exempt from the provisions of the act. Suppose that same steamship company enters into a contract with the Reading Railroad Company to carry coal to New York brought by the rail carrier to Philadelphia, then the steamship company, by virtue of this contract, would make itself amenable to the federal act.

The commerce affected falls into two groups: first, that destined to or emanating from adjacent foreign countries; second, that carried on within the United States. The purpose of the phrase, "adjacent foreign countries," is to give the commission control over the commerce moving partly within and partly without the United States, in the same manner and to the same extent that it exercises authority over commerce moving from state to state. It has been decided by a federal judge, and also in a case before the Interstate Commerce Commission that "adjacent" means contiguous. In the former,[7] Canada and Mexico were specifically named as being adjacent; in the latter,[8] Cuba is declared to be not adjacent, and[9] "substantial continuity of rails" is asserted to be the essential feature of the term "adjacent."

The immense and rapidly growing commerce to foreign countries not adjacent, described in the first part of this paper, is without the jurisdiction of the Commission, although much of our foreign commerce to non-contiguous territories is forwarded on through bills of lading from the interior of the United States, and is carried by rail to the seaboard and then transported on board a

[7]United States *vs.* Chicago, Burlington and Quincy, Judge McPherson (unreported).

[8]Lykes Steamship Line *vs.* Commercial Union *et al.,* 13 I. C. C. Rep. 310.

[9]Decided April 6, 1908.

steamer, ultimately arriving at the port of destination without the intervention of the shipper or any one on his behalf. In the case of the Cosmopolitan Shipping Company *vs.* Hamburg-American Packet Co. *et al.*, 13 I. C. C. 266,[10] Commissioner Lane, speaking for the commission, offered four reasons for lack of jurisdiction:

1. Such construction was given to the act by the Senate committee which presented the original act of 1887.

2. The act itself elsewhere (than in section 1) defines the carriers engaged in interstate commerce to which the act was made applicable.

3. Such construction is alone consistent with other provisions of the act.

4. The decisions of the courts lean toward such construction.

(1) The chairman of the Senate committee, in presenting the original act to the Senate in the year 1886, used these words:

> While the provisions of this bill are made to apply mainly to the regulation of interstate commerce, in order to regulate such commerce fairly and effectively it has been deemed necessary to extend its application also to certain classes of foreign commerce which are intimately intermingled with interstate commerce, such as shipments between the United States and adjacent countries by railroad, and the transportation by railroad of shipments between points in the United States and ports of transhipment or of entry when such shipments are destined to or received from a foreign country on through bills of lading.

(2) The act of 1887 authorized and provided a method of procedure whereby the enforcement of the provisions of section 6, touching the filing of tariffs, might be secured in the following words:

> And the said commissioners, as complainants, may also apply in any such circuit court of the United States for a writ of injunction against such common carrier, to restrain such common carrier from receiving or transporting property among the several states and territories of the United States, or between the United States and adjacent foreign countries, or between ports of transhipment and of entry and the several states and territories of the United States, as mentioned in the first section of the act, until such common carrier shall have complied with the aforesaid provisions of this section of this act.

[10]Decided March 9, 1908.

The wording of section 1 as to foreign commerce remains today as it was in 1887. The act of 1906 left out section 6. But, said the Commission, through Commissioner Lane, page 273: "The omission of this provision, therefore, we do not take as indicating that thereby any extension of the jurisdiction of the Commission was intended."

(3) If it had been the intention of Congress to give the Commission jurisdiction over water carriers transporting foreign commerce, it might be expected that adequate machinery for law enforcement would have been provided. In Commissioner Lane's opinion the following appears:

Page 274, "We look in vain, however, through the many provisions of this statute for the slightest recognition of such carriers or of the traffic which they handle. No machinery has been set up in the act by which its provisions can be enforced as to transatlantic steamship lines."

(4) The belief held by many, that the jurisdiction of the commission was co-extensive with the commerce of the United States, was based largely upon the language of the court in the Texas and Pacific case, 162 U. S. 197. After quoting the words of the earlier act, which are identical with those of the present act, beginning with the words, " . . . . carriage to such place from a port of entry either in the United States or an adjacent foreign country," the learned judge in handing down the opinion of the court said:

Page 312, "It would be difficult to use language more unmistakably signifying that Congress had in view the whole field of commerce (excepting commerce wholly within a state) as well that between the states and territories as that going or coming from foreign countries."

The Supreme Court never intended that broad construction which these words seem to convey. Judge Sanborn when called upon to interpret section 1 of the Act to Regulate Commerce, in the case of United States *vs.* Colorado and Northwestern R. R. Co.,[10a] referring to the Texas and Pacific case, said:

Page 329, "The statement that Congress had in view the whole field of interstate commerce when it passed this act is far from an assertion, and could never have been intended to be a declaration that Congress had regulated, or had intended by that act to regulate, every carrier engaged in interstate commerce within its regulating power, for that was obviously not the fact."

[10a] 157 Fed. 321.

In the dissenting opinion in the Texas and Pacific case of Mr. Justice Harlan, with whom concurred Mr. Justice Brown, is to be found a comprehensive statement as to the limitations placed on the authority which may be exercised by the commission. Referring to section 1 of the Act to Regulate Commerce, he said:

> Page 245, "From this section it is clear that the Texas and Pacific Railway Company is, and that the ocean lines connecting with that company are not, subject to the provisions of the act."

The first direct and final exposition of the jurisdiction of the commission is to be found in Commissioner Lane's opinion in the Cosmopolitan case:

> Page 279, "Therefore from the language of the act itself and the evident purpose of Congress in passing the act and the decisions of the courts, meager and unsatisfactory as they are, we are inevitably drawn to the conclusion that this commission has no jurisdiction over the transatlantic steamship lines herein involved, even though they may be parties to a through arrangement for a continuous transportation in connection with a railroad within the United States. On foreign commerce to a non-adjacent country the jurisdiction of this commission over carriers therein engaged ends at the seaboard."

While the commission has emphatically stated that it is without jurisdiction over any water-borne commerce with foreign nations other than those adjacent, it has asserted with equal emphasis its complete authority over the entire inland portion of the through transportation of merchandise destined to foreign ports. This jurisdictional right over so much of the carriage as may be inland is based on that portion of section 1 of the act which provides as follows: The act applies ". . . . to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment . . . . ."

It is immaterial whether the merchandise transported originates in the state wherein is situated the port of export, or whether the merchandise has already crossed a state line; that the merchandise in question is destined to a foreign country is sufficient to give the commission jurisdiction. Machinery moving from Syracuse to New York City upon through billing to a European point comes

under the control of the federal authority rather than state authority, because it is foreign commerce. Such merchandise is within the jurisdiction of the commission from the time it starts on its initial movement, until the moment it is transhipped on board the ocean carrier; then it passes out of the purview of the commission. On this point the commission has expressed itself in unequivocal terms. In the Cosmopolitan case, Commissioner Lane said:

> Page 281, "The federal government has said that this commission shall exercise jurisdiction over the inland portion of the haul, either to or from the foreign country." . . . "This ruling is the only one which is consistent with what seems to be the policy of the law, viz: that while restriction and control are essential as to inland carriers of foreign commerce, the ocean carriers of such commerce should remain unrestricted and free."

Just one week had elapsed after this decision was reached, when, on March 16, 1908, Mr. Justice Day, in handing down the opinion of the Supreme Court in the case of Armour Packing Company *vs.* United States, 209 U. S. 56, confirmed the correctness of the position taken by the commission. At page 78 of the opinion appears the following:

> We think the language of the statute, read in the light of the manifest purpose of its passage, shows the intent of Congress to bring interstate commerce within the control of the provisions of the law up to the time of ocean shipment.

Thus the extent of the jurisdiction of the Commission with respect to foreign commerce is at last clearly defined. The commission has neither control over the merchandise after transhipment takes place, nor jurisdiction over the transoceanic carrier. Its authority terminates at the seaboard. This conclusion was reached almost simultaneously by the Interstate Commerce Commission, by the Circuit Court of Appeals, and by the Supreme Court of the United States.

III

Consequences of Incomplete Jurisdiction

From the decisions cited in Part II of this paper, it is evident that Congress must have intended that ocean commerce should be free from any restrictions whatsoever as to rebates, publicity, main-

tenance of rates and pooling. The transoceanic carriers may do every one of the things which the inland carriers are prohibited from doing. Where two millers ship flour, or two packing houses consign provisions to a European port, both pay the published inland rate in the negotiation, but as a general rule they pay different ocean rates. The two through rates enjoyed, combination or joint, as the case may be, may result in discriminatory rates between shippers, or in various preferences enjoyed by one to the disadvantage of the other. But the transportation is a through transportation. The contract is a through contract. It is an entirety.

Under former conditions, whenever a through bill of lading was involved, the steamship companies became partners with the railroads in all of the latter's evil practices. The indictments recently brought against the Southern Pacific Railway Company and the Pacific Mail Steamship Company, for rebating on foreign traffic, indicate that such partnerships may be of the present as well as of the past. Where two carriers are engaged in performing parts of the same service, no matter with how painstaking a care enforcement of the law is sought against one, if the other party to the arrangement is permitted to remain without supervision an invitation is thereby held out to continue the very evil it was intended by the law to suppress. The indivisible nature of present through transportation makes it impossible to apply one set of rules to one part of that transportation, and another set of rules to another part of it. The inland carrier may be an innocent or guilty accessory to the unfair dealings; it may be an unwilling partner to discriminations between persons, or between places: but in either event, under the present law the ocean carrier goes free. And unless the inland carrier may be brought to book, as was suggested by Commissioner Lane in the Cosmopolitan Case, the Commission is powerless to afford relief.

Under the present ruling, ocean commerce is without the jurisdiction of the Commission more fully than intrastate commerce is without the jurisdiction of the Commission.

On the supposition that certain ocean rates are liable to fluctuate, a low ocean rate may be quoted to a favored shipper in return for large inland shipments, just as a low intrastate rate may be offered as a special inducement for interstate shipments. The Commission is thus placed in the position of endeavoring to compel

one of the partners to a through contract to obey the law, while it is forced by a deficiency in the same law to ignore rebating, discriminations, and other reprehensible practices of the other partner—the very thing it was intended to prohibit.

The Interstate Commerce Commission is the guardian of American Commerce. Its mission is to prevent discrimination, to give to great and small, to the giant corporation and the humblest shipper, a fair chance in matters of transportation. But under present conditions, steamship pools largely dictate the rates, the line, the route, the method and every other condition of traffic to which the American producer, manufacturer, or shipper must submit, if he desires to introduce his merchandise to foreign consumers in other than adjacent foreign countries. What possible difference can there be from the shipper's standpoint whether the discrimination or preference be suffered at the hands of a railroad, or at the hands of a steamship company?

The Interstate Commerce Commission is also a special committee of Congress invested with inquisitorial powers, created for the purpose of collecting data by which Congress may be guided in the preparation and enactment of appropriate commercial legislation. Congress may call upon it for expert information concerning only those carriers which are within the meaning of the act. But Congress having failed to give the Commission authority over ocean carriers is unable to avail itself of the splendid ability of a highly trained body when inquiry is made concerning the conditions of trans-oceanic trade and traffic. Congress must acquire information from other sources, necessarily less competent and less reliable. Legislation suffers accordingly.

Two points may be cited as consequences of the incomplete jurisdiction of the Commission:

First.—Congress sought by law to put shippers on an equal basis. The act of 1887 is without the elasticity so necessary to meet changing conditions of trade and traffic. The abuses which the activities of the Commission have practically wiped out in the field of interstate commerce have been transferred to another field—the field of interstate-oceanic commerce. In the latter field the authority of the Commission is too limited to be effective. The old evils are renewed; the only change is that the sufferers are a

new group engaged in doing a similar business but over a larger area.

Second.—Congress, having failed to give the Commission complete jurisdiction over the enlarged business area, is without what would have proved a most reliable and fertile source of information on which to base legislation. Instead of drawing on an impartial source for information, Congress can apply only to those whose so-called vested interests may be affected. This is made more unfortunate by the fact that the greater portion of our trans-oceanic commerce is carried on by interests not American. Biased legislation has been the inevitable result.

IV

Suggested Legislation

With the growth of those fields from which our export merchandise is drawn and into which it is transported, it is presumable that there should be a corresponding amplification of the powers of the Interstate Commerce Commission, not in severity but in breadth of scope, thus enabling the Commission to keep pace not only with changing commercial conditions, but also with the rapid commercial development of the United States. Before any constructive legislation can be offered for consideration, it must be established to a certainty that it is both possible and practicable to give the Commission control over the ocean portion of through transportation.

The relation of ocean carrier to railway in through transportation is almost identical with the relation of railway to connecting railway in the same through transportation. For example, there is a conventional division of charges between all the carriers—payment for the entire transportation being made at the point of origin by the shipper to the carrier receiving the merchandise. Subsequently the proper charges due to the remaining carriers upon the route are paid over to them respectively. That the railroads and steamship companies regard each other as portions of the same route is clearly indicated in the following account, which shows the method of carrying forward and dividing transportation charges. It is to be noted that the steamship company receives its payment precisely in the same manner as does any railway carrier succeeding the carrier at the point of origin. There is a conventional divi-

Statement showing adjustment, division and final statement of total through freight (inland and ocean freight) on a shipment of 250 sacks flour (in 220 pound cotton sacks) from Alton, Ill., U. S. A., to Copenhagen, Denmark.

Inland freight.....16½ cents, Alton to Philadelphia $90.75
Ocean freight.....14 cents, Philadelphia to Copenhagen 77.00

Total through freight..30½ cents per 100 pounds (weight of flour, 55,000 pounds, was prepaid in cash at Alton, Ill.) $167.75

The earnings would be divided and distributed among the transportation companies as follows:

$167.75 Alton, Ill., to Edwardsville, Ill., 2 cents per 100 pounds,
Less 11.00 amounting to $11.00
$156.75 to be deducted from the total amount, and the balance ($156.75) paid to agent of the connecting road.

$167.75 From Edwardsville, Ill., to Continental, O., the earnings
Less 36.68 divided on basis of 35.9 per cent, a total of..... $25.68
$131.07 Total earnings on this point ($36.68) and balance ($131.07) paid to the agent of the next connecting road.

$167.75 Between Continental, O., and Buffalo, N. Y., earnings
Less 55.18 would be based on 25.88 per cent, the local earnings.... $18.50
$112.57 The total earnings to this point, $55.18. This amount would be deducted and balance of charges ($112.57) paid over to the agent of the next connecting road.

$167.75 Between Buffalo and East Penn Junction the earnings
Less 75.67 would be on the basis of 28.66 per cent, the local
earnings being $20.49
$92.08 A total earnings up to this point of $75.67. This would be deducted from the total amount and the balance, $92.08, paid to the agent of the next connecting road.

$167.75 Between East Penn Junction and Philadelphia, earnings
Less 90.75 would be on the basis of 9.55 per cent, local earnings.. $6.83
Philadelphia terminal charge 8.25
$77.00 A total of $15.08. This amount, plus the $77.00 ocean freight, would be placed to the credit of the agent of the terminal road at Philadelphia.

$77.00 The railroad agent in Philadelphia would deduct the
Balance. freight from East Penn Junction to Philadelphia, and the terminal charges at Philadelphia, amounting together to $15.08, as per above, and pay over to the ocean carrier balance of the total through freight and charges, Alton, Ill., to Copenhagen, Denmark $77.00

$167.75

sion of charges between all the carriers. Total payment for the transportation is made at the point of origin and subsequently the proper agreed-upon proportions are paid over.

The commerce clause of the constitution has given Congress power to regulate the foreign and interstate commerce of the United States. No similar authority is granted over intrastate commerce. Nevertheless the Supreme Court has said that where an intrastate carrier receives merchandise from outside that state, and such merchandise is shipped under a through bill of lading, and a conventional division of charges is made, such commerce is within the jurisdiction of the Commission.[11] If the authority of the Commission can thus be projected into a state where Congress can have no direct authority over interstate commerce, much more can that authority be projected over the ocean where Congress is specially authorized to regulate commerce with foreign nations. It follows as by demonstration, that when ocean carriers operate within the United States; when they enter into contracts for the carriage of through freight on through bills of lading from interior points in the United States to ports of ultimate destination; when they participate in through rates and charges,—then they become a part of a continuous line, not by consolidation, but by arrangement for a continuous carriage or shipment. When such conditions as these are present it follows that the Interstate Commerce Commission could readily be given authority to exercise the same jurisdiction over the ocean carrier as it now exercises over a carrier wholly within a state acting in a similar manner towards a connecting interstate carrier.[12] It is legally possible to give the Commission control over the ocean portion of through transportation.

Are there insurmountable practical difficulties in the way of giving the Commission control over the ocean as well as the inland portion of through traffic shipments? It may be said that to give the Commission authority worthy of the name will be to interfere unduly with the ships of foreign nations, and thus disturb international comity. Such an assertion is without foundation. It is the common practice of all nations to lay down firm and unequivocal rules with which the ships of all nations must comply before being allowed

[11]Social Circle Case, 162 U. S. 184.

[12]This is now the rule with respect to the Great Lakes which are also international highways. U. S. *vs.* Wood, 145 Fed. 405.

to carry cargo from the ports of the legislating country. England, Germany, and other countries from which emigrants come to America make specific requirements as to space, ventilation, food, fire protection, etc., that must be provided before a vessel is permitted to depart with its quota of emigrants. This applies not alone to the vessels of the legislating country but also to the vessels of other nations.

The United States government exercises absolute control over the exportation of cattle from its ports.[13] Fifty-nine regulations, applying to vessels no matter what flag they may fly, provide among many other things minute details for the feeding of the cattle, the space and location which they must have, the places in which food must be kept, the order of its use, etc.[14]

The ships of foreign as well as domestic owners cannot clear from our ports if there is on board a single can of lard which does not bear the stamp of the Department of Agriculture stating that it "is from animals that were free from disease and that it has been inspected and passed as sound and wholesome, as provided by law and regulation of the Department." The government of the United States forbids the ships of foreign powers to sail unless the cattle on the decks of their vessels have stanchions of a certain kind of wood, of specified dimensions, placed in such and such a manner. If all these stipulations can be carried out without a jar to international comity, it is certainly neither unnatural nor abnormal that this country should also require that these same commodities should, when the vessels of any nation are finally permitted to sail, be carried under conditions which do not produce discriminations within our borders. This is a necessary prerequisite to safeguard the freedom of intercourse, prosperity, and the general welfare. There is, therefore, precedent for giving the Commission control over the ocean portion of through transportation, and there need be no fear of thus disturbing international comity.

In order effectively to regulate foreign commerce of the United States it is not necessary for us to go into foreign countries or in

[13]See Bureau of Animal Industry, Order No. 139, and acts of Congress approved March 3, 1891; March 22, 1898; March 30, 1906.

[14]The minuteness of this control may be discovered by referring to Regulation 56, which provides, "that the inspector may, in case he finds that any of the fittings are worn, decayed, or defective in construction or appear to be unsound, require the same to be replaced before he authorizes the clearance of the vessel."

any way trespass upon their sovereignty. A foreign company may make whatever agreements it may please or do any acts in its own land, but when it comes to the doors of the United States and wishes to do business with our citizens, Congress has the constitutional power to require such a company to dispossess itself of all agreements and all practices that are in conflict with either the letter or spirit of our laws. Indeed, the transoceanic carrier frequently transports merchandise for a long distance on the waters of the United States. For example, merchandise shipped from Chicago to Copenhagen via Philadelphia must be carried by the ocean steamer one hundred and one miles down the Delaware River before the vessel puts to sea; or if the merchandise is shipped via Baltimore, the vessel must traverse more than one hundred and sixty miles of waters belonging to the United States. Thus a monopoly of the ocean portion of through transportation, or an ocean pool, or a discrimination may be consummated within our gates. Since the United States is sovereign over its own waters, regulation of ocean carriers can be made effective, and abuses of the sort described above can be eradicated.

Ocean carriers and inland carriers are inseparable parts of through transportation, and it is an established fact that gigantic pools and monopolies dominate trade and traffic on the high seas. That there results a large degree of control over the inland portion of through transportation by those having the mastery of the ocean cannot be doubted. It has been demonstrated that it is not only possible, but that it is practicable, to give the Interstate Commerce Commission power to supervise the ocean portion of through transportation. To this has been added the power of precedent already set. It has been shown that regulation of the ocean portion of through transportation can be supported by an effective sanction. Finally, the Interstate Commerce Commission, by virtue of its relation to inland carriers is the logical repository for any supervisory authority that may be granted for the purpose of regulating transoceanic carriers.

It is not suggested that the Commission should be given power to refuse steamship companies the right of access to the United States. No such power is contemplated. The exercise of such a power would never be endured by our own merchants or by foreign nations. But a proper extension of authority over through trans-

portation would, in no way, impinge upon foreign sovereignties. The Commission should be given the power to require any steamship company of whatever nation, doing business within the United States, to deal fairly with American exporters and importers, and with American competitors flying the flag of the United States. The Commission should be given authority to ascertain to what extent blame should be attached to a steamship company as well as a railway company for giving undue preferences. The Commission should be given authority to forbid any steamship company to discriminate within the United States between persons, places, and things. The Commission should be given authority to prevent the fulfillment of any contracts between steamship companies, the consummation of which would result in the improper pooling of traffic in the United States. Those steamship companies which might refuse to conform to the spirit and letter of our Constitution and laws should be refused the privilege to transact any business beyond our seaboard.

The Interstate Commerce Commission ought to be given practically the same general power over the ocean carrier with respect to through transportation as it now exercises over the inland carrier. Transoceanic steamship companies forming part of a through route should be required to file with the Interstate Commerce Commission rates concurred in with the trunk line railroads and associates. These line tariffs should be accessible to anyone applying at any steamship company's office. If the Commission were given power to compel the respective inland and ocean carriers to file and concur in joint through rates and follow the rates so filed, the steamship companies themselves would be greatly benefited. Rates would be less susceptible to variation, and a desirable degree of stability, now sought to be maintained by improper methods, legally accomplished. More publicity of rates would minimize the unfair conditions under which shippers of through merchandise labor, and tend to rectify other present abuses. Railway rates now filed and published stand for at least thirty days unless the Commission issues an order permitting them to be altered in a less time. This minimum period might be changed to ten days for through traffic without greatly affecting the real purpose or beneficial results of the law. As indicated heretofore, such a ten-day period would not be unjust for through traffic as applied to ocean carriers.

Steamship companies should be required to file with the Interstate Commerce Commission all contracts entered into between themselves and with the railways relative to through transportation of merchandise. Such contracts would show whether certain ports or places were suffering from discrimination. If discrimination were present the improper contract could be dissolved.

If the Interstate Commerce Commission is to accomplish fully the wise purpose for which it was created it should be given general supervisory authority over steamship companies forming a part of a through rate. Some of the benefits flowing from wise supervision which would reach both the carriers and the shippers have already been indicated. Benefits would at the same time accrue to various departments charged with the administration of government. Thus not only would carriers and shippers be put upon a fair and equal basis, but a fertile source of material, necessarily in the hands of a supervisory body, would also be readily accessible on which, among other things, to base standards of transportation costs.

The first objection, and the one advocated with greatest pertinacity, offered to this program is, that it is impossible to file with the Commission an ocean rate as part of a through rate. This contention is based upon the assumption that ocean rates are not stable, but changing from hour to hour and from day to day. No one will deny that this contention is reasonably true as to purely ocean commerce. But no one knows better than a steamship man how altogether specious is the claim that through rates are constantly fluctuating, and for the following reasons: (1) The rate at which much of our through export and import merchandise moves is now fixed annually by contracts between ocean carrier and shipper. (2) Furthermore, as already pointed out, it ordinarily takes at least from fifteen to thirty days to transport flour, provisions, oil cake, etc., from the point of origin to the seaboard. (3) The plea of necessity of offering "Fill up" rates to obtain cargo falls flat when applied to through traffic.

The plea that it is necessary to offer a low rate to a large shipper and a high rate to a small shipper in order to obtain merchandise for transportation, has been exploded so far as railways are concerned. Equality of railroad rates to shippers is to-day recognized as an accomplished fact. Why not equality of steamship rates as well? It is possible, practicable, and desirable. The railways do not chafe

under the control of the Interstate Commerce Commission. They welcome the protection and stability which obedience to the Act to Regulate Commerce affords. Their rates are open to all. Access to their services is denied to none. If the proposed extension of the Commission's power becomes an accomplished fact, the benefits now enjoyed by the railroads alone will then be equally shared by the transoceanic carrier. Transportation facilities of every sort will be denied to none and the benefits of wise legislation will be made permanent.

The most gratifying result of the commercial legislation of the United States is the fact that there is now a fair chance for the inland producer and shipper, however great or small he may be. The giant corporation cannot now crush out its humble rival through the willing or unwilling connivance of the railway. Under present conditions the giant corporation holds the same advantage over the small shipper when both are engaged in the export trade, as it did twenty years ago when both were engaged only in the domestic trade. Our laws should therefore be amended so as to bring about equality throughout the whole field of our commerce.